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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 295

UNITED STATES OF AMERICA,
Appellant,

vs.

GEORGE I. WITKOVICH, ALSO KNOWN AS JURI ISADOR WITKOVICH.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE APPELLEE.

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BRIEF FOR THE APPELLEE.

STATEMENT.

Appellee, an alien, was indicted under Section 1252 (d) of the Immigration & Nationality Act of 1952, Title 8, United States Code, for wilful failure to answer questions contained in the indictment (R. 2).

THE GOVERNMENT HAS MISSTATED THE QUESTION PRESENTED.

At the threshold it is necessary to correct the government's statement on pages 2, 5 and 14 of its brief that the question presented i Whether an alien ordered de-

ported for membership in the Communist Party, who is subject to supervision under section 242 (d) of the Immigration and Nationality Act of 1952 pending deportation, may be questioned concerning present membership in and activities on behalf of the Communist Party and other organizations and concerning associations with particular individuals, or whether the inquiry authorized by the statute must relate solely to the alien's availability for deportation."

The indictment (R. 1) charges that the appellee was an alien against whom an order of deportation had issued, that he was required to give information under oath, as prescribed by the provisions of Title 8 U. S. Code, Section 1252 (d), and that he failed to answer certain questions. There is no more.

There is nothing in the record before this Court, except as it is gratuitously supplied by the United States Attorney (R. 27), and then in the same manner raised to the dignity of proof on page 33 of the brief that "the question presented is whether an alien ordered deported for past membership in the Communist Party who is subject to such an order of supervision, may be questioned concerning present membership in and activities on behalf of the Communist Party" etc.

The government has confused the District Court's dismissal of the indictment with a trial on the merits which has not yet been had. Page 33 of the government's brief says: "First, it is to be kept in mind that appellee at no point contends that he is not rightfully being deported, nor does he claim that the administrative proceedings in which he was ordered deported were procedurally defective or unlawful in any manner. The status of the appellee as an undesirable alien under order of deportation is accordingly clear and uncontroverted."

The case has not been tried. There has been no opportunity to contend "that he is not rightfully being deported". There has likewise been no opportunity to "claim that the administrative proceedings in which he was ordered deported were procedurally defective or unlawful in any manner." It is therefore impossible to conclude, except by tortured conjecture and for the sole purpose of fabricating an argument that "[t]he status of the appellee as an undesirable alien under order of deportation is accordingly clear and uncontroverted."

The clarity in the record is that there has been no trial on the merits, and that the facts alleged have not been proved.

Before this Court there is only the government's appeal from an order of the District Court dismissing the indictment "for the reason that none of the questions there set forth is relevant to defendant's availability to deportation." (R. 25.)

The fact is that appellee, in moving to dismiss the indictment raised the specific objection that the indictment did not set out an order of deportation sufficient to advise the appellee of the cause of the order of deportation, or what else he was obliged to meet by way of defense. (R. 3 and 4.)

The statute [8 U. S. C. Section 1251] makes about twenty-five different classes of aliens deportable—those who enter the country without inspection, those who are anarchists, those who are narcotic drug addicts who have been convicted of a violation of any law or regulation controlling narcotics, those connected with a house of prostitution or immoral place, those convicted of possessing or carrying a weapon which shoots automatically, those violating the Alien Registration Act, members of the communist party and numerous other classifications.

To say that the question presented involves an alien ordered deported for membership in the communist party is a misstatement under the record before the court.

All parties should be bound by the record.

Hence the appellee in his brief will give little scope to the references of the government to communists, citation of cases based upon communists or communism, and the conclusions of the government on what ought to be permitted in relation to them, except as it may become incidentally necessary to do so in this brief.

Appellee's brief hopes to bring to the attention of the Court the various arguments to be made on his motion to dismiss the indictment as viewed from the four corners of the indictment, to direct the Court's attention to the logic of the District Court in dismissing the indictment, and to respectfully request the Court further to consider the constitutional issues involved in this indictment, those issues having been raised in the District Court. (R. 4, 5, 6.)

Relying upon the language in *United States* v. *Spector*, 343 U. S. 169 (1952), we raise the constitutional issues in the hope that this Court will pass upon them.

SUMMARY OF ARGUMENT.

The District Court dismissed the indictment (R. 1-3) because none of the questions set forth therein were "relevant to defendant's availability to deportation" (R. 25). The theory of the Court, based on prior decisions, analogous situations and the logic of the particular circumstances of the individual case, dictated that result.

The court stated in effect that the attorney general is powerless to take any action against a person ordered deported except to deport him; that the attorney general is given power to supervise the alien to make sure the alien is available for deportation and that he has no further power (R. 10); that the questions asked must relate to the valid power of the attorney general.

Subsequently the United States Attorney asked for clarification of the court's opinion; the appellee moved the court to consider the questions in the indictment and to rule on their pertinency or relevancy to the power of the attorney general. Thereupon the court dismissed the indictment for the reasons stated (R. 25).

Appellee, of course, is in agreement with the District Court that the questions asked are not relevant to the availability of the appellee for deportation, that therefore no crime is charged in the indictment, and the indictment should be dismissed.

Since the government appealed from the order of the District Court, this appeal affords the appellee an opportunity to again raise the substantive constitutional objections which were part of his original motions to dismiss the indictment, and to urge this Court to consider them.

The objections argued in this brief to the statute and to the indictment are:

Congress attempts to create a new crime based solely on a failure to speak on matters unrelated and not pertinent to the power of the attorney general to deport, and there can be no crime for failure to speak, unaccompanied by any act forbidden by law, in an area where the law places no limitation of any kind on the scope of the inquiry.

There is a violation of appellee's rights under the First Amendment which guarantees to him freedom of speech and lawful assembly, but which are denied appellee when he is subject to imprisonment for failure to state whether he knows certain persons, for failure to state what he reads, what moving pictures he sees, what lodges he attends.

Both the statute and the indictment are too vague to charge a crime under the Fifth Amendment since the statute places no limitation upon the right of inquiry but permits the attorney general to inquire as "he may deem fit and proper". The Act provides no ascertainable standards of guilt.

The appellee is deprived of procedural due process because the Act consists of severing the issue of unlawful presence in the country for administrative determination, and the administrative determination then becomes conclusive upon the criminal court. To thus subdivide a charge against an alien avoids jury trial by submitting the vital and controversial part of the charge to administrative decision. The Act denies to appellee a jury trial to pass on the basic element of the crime charged; neither is he permitted to confront and cross-examine the witnesses against him.

The statute is contrary to the constitutional direction against bills of attainder and *ex post facto* laws.

The appellee is further denied due process in that without judicial trial he is subjected to supervision, restrictions on his right of locomotion, and interference with his normal associations and business, and he is required to conform to regulations dictated solely by the attorney general without any relevance to the particular situation of the appellee.

The statute is repugnant to the Tenth Amendment as well, because it interferes with the powers retained by the states, and also because the scheme of supervision designed by the statute is not a necessary and proper power to the right to deport.

Supervision is intended as punishment and does not serve to protect the nation or to facilitate the right to deport.

The appellee is denied the equal protection of the law not only as an alien, but by reason of the unlawful delegation of power to the attorney general who has no implied authority to repeal, extend or modify an Act of Congress.

The indictment is insufficient otherwise to charge a crime, because it fails to allege material and substantive matters which go to the gravamen of the alleged crime; the indictment does not show what order of deportation, if any, was entered, by whom, for what reasons, that the appellee had knowledge thereof, or of the orders of supervision, or that the order of deportation was under a particular statute which requires that the appellee be subject to supervision.

Point I.

THE OPINION OF THE DISTRICT COURT.

The language of Title 8 U. S. C. 1252 (d) is cited at R. 16, 17.

Appellee appeared before the Immigration Service (R. 32) and answered questions as to his place of residence, the members of his family, his work, his income, the ownership of property, what he did with his spare time, his place of employment, that he had a social security number, that he had registered as an alien, and numerous other questions, all indicating his compliance with the regulations laid down by the attorney general.

The attorney general knew at all times where the appellee could be found, knew that he had registered, that he had been reporting to the Immigration Service from time to time and that he had responded to the call of the Service.

The court below held that whether the delegation of power to the attorney general was a valid delegation can only be determined by an examination of the section in its context and the cases which have interpreted that section. The court held: "It is apparent from this summary of the deportation procedure that after the entry of a final order of deportation, the sole remaining power and duty of the Attorney General is to make sure that the alien departs from the country. It follows that the powers of supervision given him are intended as an aid in enforcing this power by making certain that the alien will be available for deportation when and if the time comes that this is possible." (R. 18, 19.)

The court also held that there is no warrant for an interpretation of the section that the attorney general may

question the alien to determine not only his availability for deportation, but also to satisfy himself that the activities for which the alien was ordered deported are not continuing.

The court further held that the court will determine the relevancy of the questions by a definite standard: do they assist the attorney general in making certain that the alien will be available for deportation.

Subsequently the appellee requested the court to examine the questions set forth in the indictment and to dismiss the indictment for the reason that it is apparent that none of the questions is relevant to his availability for deportation. (R. 22.)

The court found that such procedure is dictated by analogous situations in other fields such as determining whether or not the privilege against self-incrimination has been properly claimed; in a prosecution for perjury the materiality of the questions asked is a question of law for the court; and that materiality should appear from the face of the indictment. (R. 22.)

Hoffman v. *United States*, 341 U. S. 479, 489 (1951).

Emspak v. *United States*, 349 U. S. 190, 199 (1955).

Sinclair v. *United States*, 279 U. S. 263, 298 (1929).

United States v. *Orman*, 207 F. 2d 148, 155 (1953).

Markham v. *United States*, 160 U. S. 319, 325 (1895).

Where it appears from the indictment that the questions alleged are not even probably material, the indictment should be dismissed.

United States v. *Garvett*, 35 F. Supp. 644, 646 (1940).

United States v. *Seymour*, 50 F. 2d 930, 940 (1931).

United States v. *Cameron*, 282 Fed. 684, 692 (1922).

Where it is perfectly apparent to the trial judge from the face of the indictment that the questions set forth are irrelevant, the defendant will not be exposed to what would be a "mere ceremony of trial." *United States* v. *Laut*, 17 F. R. D. 31, 36 (S. D. N. Y., 1955).

The District Court found that of the twenty-two questions on which the indictment is based many were so far afield as to require no discussion as they were in no way relevant to the purpose of deportation. (R. 23.) The court in discussing some of the questions determined that they were completely meaningless.

The District Court upheld the constitutionality of the Act but dismissed the indictment for the reason that none of the questions there set forth is relevant to defendant's availability to deportation. (R. 25.)

Point II.

THE INDICTMENT IS IN DEROGATION OF THE FIRST AMENDMENT.

The indictment is in derogation of the First Amendment to the Constitution.

Failure to speak in the present context is not a crime.

The indictment is based on an alleged crime wholly unknown to the common law.

A crime is generally defined as the commission or omission of an act specifically forbidden, or commanded to be done, by law, accompanied by an intent. The intent need not always be present, depending upon the kind and purpose of the law.

To speak falsely on material matters under oath in a judicial proceeding may constitute the crime of perjury.

To speak so as to incite to violence may constitute a crime.

For persons, through speech, to agree upon an unlawful act may be conspiracy.

To refuse to speak under some circumstances, depending upon legislation providing therefor, may be punishable as a contempt of court or of a legislative body. In the former situation, however, there is an inherent right to purge oneself of the contempt, before liability to punishment.

In relation to testifying before a legislative body of the federal government, there is specific legislation defining the scope of that body's proper inquiry.

Title 2, U. S. C. section 192 provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question *pertinent to the question under inquiry*, (emphasis added) shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months. As amended June 22, 1938, c. 594, 52 Stat. 942."

Thus it will be seen that a congressional committee, whose right of inquiry has been upheld, is nevertheless limited in scope to that which is "pertinent to the question under inquiry," so that while a witness is being questioned he at least has some area for determination on the basis of pertinency, whether he should answer. The court may subsequently disagree with his judgment, but all doors are not initially closed to him.

Section 1252 (d), however, tells a witness that there

is no periphery to the inquiry. He must answer any absurdity put to him by a subordinate in the Service, or hazard sanctions.

There is no basis in Anglo-Saxon law for such an overweening grasp of power on the part of any official.

1252 (d) requires the appellee "to give information under oath * * * as the Attorney General may deem fit and proper."

It is apparent that the limitation in section 192 quoted above "pertinent to the question under inquiry" makes that section fall within constitutionally permitted commands, whereas the unlimited and uninhibited provision of 1252 (d), "as the Attorney General may deem fit and proper", places that section beyond the scope of constitutionally acceptable legislation.

Here, Congress attempted to create a crime based only on a refusal to speak on any subject at all, "whether or not related to the foregoing, as the Attorney General may deem fit and proper."

Here, no affirmative act is involved, nor is there a failure to act. The defendant has not refused to appear before the Immigration Service in response to its call. It knows where to find him; he comes when he is summoned. The defendant has done no act forbidden by the statute or regulation; he has simply refused to answer those questions which a reasonable person would regard as not being relevant to the issue or to the right of the attorney general to deport.

There is no authority for Congress to make criminal that which is a natural right—to remain silent. On the contrary, the Constitution of the United States and the amendments thereto guarantee the right of privacy.

Congress attempts, through an administrative agency, to propound questions to a defendant, and upon his fail-

ure or refusal to answer, upon whatever grounds, constitutional or otherwise, (the act makes no distinction) without more, an indictment results with possible punishment of fine and imprisonment.

Section 1252 (d) makes no provision for a review of the administrative proceeding to determine the relevance or fairness of the questions propounded, or of the right of a defendant to refuse to answer, whether on constitutional grounds or otherwise. Any questions the Service can conjure up, whether related or not to the deportation of the defendant, whether propounded in good faith or for the express purpose of creating criminal liability, is the springboard, from which the defendant may find himself imprisoned for a year and fined.

Please note (R. 2) "Do you subscribe to the Daily Worker?" "Do you know the editor of Narodni Glasnik?" "Since the order of deportation was entered in your case on June 25, 1953 have you attended any meeting of the Communist Party of the U. S. A.?" "Since the order of supervision was entered on March 4, 1954 have you attended any meeting of any organization other than the singing club?" "Have you addressed any lodges of the Slovene National Benefit Society requesting their aid in your case, since the order of deportation was entered June 25, 1953?" "• • • have you attended any meetings or lectures at the Peoples Auditorium • • •?" "• • • have you attend.. any meetings or socials at the Chopin Cultural Center • • •?" "Have you attended any movies • • • at the Cinema Annex • • •?"

The foregoing are questions directly concerned with the appellee's right of free speech and lawful assembly which are guaranteed to him by the First Amendment. As to those matters, the right of free speech and freedom of assembly carry with them the correlative right to remain silent as to matters of lawful speech and lawful assembly.

> "Freedom of worship, freedom of speech and freedom of press, and the right of assembly are not the subject of direct constitutional grant. They are, however, constitutionally recognized and confirmed as attributes of liberty incident to all persons under the Constitution and laws of the United States regardless of their citizenship; and, as such, they are secured by the First Amendment against abridgement by the Congress and by the Fourteenth Amendment against deprivation by a state without due process of law."
>
> *Douglas* v. *City of Jeannette, Pa.*, 130 F. 2d 652 (1942), affirmed 63 S. Ct. 877, 319 U. S. 157 (1943).

The First Amendment says that Congress shall make no law abridging freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances. That positive prohibition should find support under all circumstances, but certainly in relation to an inquisition designed to result in punishment not for acts, but for failure to speak. The attorney general or his subordinates may not be permitted to act as a roving grand jury to see what traps it might set for the unwary, "as the Attorney General may deem fit and proper."

Point III.

SECTION 1252 (d) IS VAGUE AND INDEFINITE.

Section 1252 (d) is vague and indefinite in violation of the Fifth Amendment to the Constitution.

A penal statute is to be strictly construed, especially must criminal statutes not known to the common law be strictly construed.

A statute which on its face and as applied is so vague and indefinite, as to permit within its scope, its adminis-

trators and enforcers, to burden, prohibit or make criminal, conduct which is constitutionally permissible and protected, violates the Fifth Amendment.

Winters v. *New York*, 333 U. S. 507 (1948).
Herndon v. *Lowry*, 301 U. S. 242 (1937).
Stromberg v. *California*, 283 U. S. 359 (1931).

Subparagraphs 1, 2, 3 and 4 of section 1252 (d) give the attorney general an undefined latitude to impose written regulations and restrictions on the appellee's conduct and activity and in making criminal their violation is broad enough to "permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech [and] is void * * *." *Winters* v. *New York*, 333 U. S. 507, 509 (1948).

An alien, whether deportable or not, while in residence here, is entitled to the guarantees of freedom of speech, press and association, without inquisition by the Immigration Service, as protected by the First Amendment.

Bridges v. *Wixon*, 326 U. S. 135 (1945).
Chew v. *Colding*, 344 U. S. 590, 596 ftn. 5 (1953).

A pending deportation does not make unavailable to aliens guaranties of freedom of speech. *United States ex rel. Mezei* v. *Shaughnessy*, 195 F. 2d 964, reversed on other grounds (C. A. 2d, 1952), 345 U. S. 206 (1953).

We deal here with the validity of a criminal statute. To use the test of *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926), the question is whether this statute "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." In determining that question the statute must be considered on its face.

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of

> the offense intended to be charged would not serve to validate it. * * * It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. * * * No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids."
>
> *Lanzatta* v. *New Jersey*, 306 U. S. 451, 453 (1939).
>
> "The question therefore is not what the indictment charges nor what the proof might be. It is whether the statute itself is sufficiently narrow and precise as to give fair warning." Justice Douglas dissenting in *U. S.* v. *Harriss*, 347 U. S. 612 (1954).

What is meant by "to submit if necessary to medical and psychiatric examination" and who is to determine the necessity? What is meant by giving information "whether or not related to the foregoing as the attorney general may deem fit and proper"? We have heretofore shown the limitless lengths to which this would permit the attorney general or his subordinate to go to demand information. What is meant by "to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General"? Again, if there is a legitimate disagreement as to what is "reasonable", does a person have to submit to the hazards and expense of a criminal trial to find out what are "reasonable written restrictions on conduct and activities"?

The language of the statute is so vague and indefinite as to make it impossible for the defendant to ascertain what it is he must or may not do, under criminal penalty, in violation of his rights under the Fifth Amendment.

Without the ascertainable standards of guilt required by the Fifth Amendment to the Constitution, the defendant must make such determination at the risk of criminal trial.

"The vice of vagueness in criminal statutes is the

> treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula."
>
> *United States* v. *Cardiff*, 344 U. S. 174, 176 (1952).

No unlimited power to interrogate resides in any branch of the government. Unless it is an aid to the proper exercise of some power which the government may constitutionally have, the usurpation of a right to examine may violate one or more of the constitutionally protected rights of the subject of the interrogation. *Quinn* v. *United States*, 349 U. S. 155, 161 (1955). The statutory mandate giving to the attorney general the right to exercise the power "as [he] may deem fit and proper" permits its exercise in areas protected by the First, Fourth and Fifth amendments to the Constitution, as well as areas which are in no way relevant and pertinent, and is therefore void.

U. S. v. *Harriss*, 347 U. S. 612, 617, 631, 632, 634 (1954), concerned the law against lobbying. The District Court dismissed the information on the ground that the law was unconstitutional. The Supreme Court reversed and remanded for further proceedings, and stated "We are not concerned here with the sufficiency of the information as a criminal pleading." Justices Douglas and Black dissented. Justice Jackson dissented in a separate opinion.

Justice Douglas said the following:

> "* * * Here, if we give the words of the Act their ordinary meaning, we do not know what the terminal points are. Judging from the words Congress used, one type of activity which I have enumerated is as much proscribed as another.
>
> The importance of the problem is emphasized by reason of the fact that this legislation is in the domain of the First Amendment. That Amendment provides that 'Congress shall make no law * * * abridging the freedom of speech, or of the press;

or the right of the people * * * to petition the government for a redress of grievances.' * * *

The language of the Act is so broad that one who writes a letter or makes a speech or publishes an article or distributes literature or does many of the other things with which appellees are charged has no fair notice when he is close to the prohibited line. No construction we give it today will make clear retroactively the vague standards that confronted appellees when they did the acts now charged against them as criminal. *Cf. Pierce* v. *United States*, 314 U. S. 306, 311. Since the act touches on the exercise of the First Amendment rights, and is not narrowly drawn to meet precise evils, its vagueness has some of the evils of a continuous and effective restraint."

It is appropriate to quote from Justice Jackson's dissent:

"I agree, of course, that we should make liberal interpretations to save legislative Acts, including penal statutes which punish conduct traditionally recognized as morally 'wrong.' Whoever kidnaps, steals, kills, or commits similar acts of violence upon another is bound to know that he is inviting retribution by society, and many of the statutes which define these long established crimes are traditionally and perhaps necessarily vague. But we are dealing with a novel offense that has no established bounds and no such moral basis. * * *

In matters of this nature, it does not seem wise to leave the scope of a criminal Act, close to impinging on the right of petition, dependent upon judicial construction for its limitations. Judicial construction, constitutional or statutory, always is subject to hazards of judicial reconstruction. One may rely on today's narrow interpretation only at his peril, for some later Court may expand the Act to include, in accordance with its terms what today the Court excludes. * * * The *ex post facto* provision of our Constitution has not been held to protect the citizen against a retroactive change in decisional law, but it does against such a prejudicial change in legislation. As long as this statute stands on

the books, its vagueness will be a contingent threat to activities which the court today rules out, the contingency being a change of views by the Court as hereafter constituted."

In the case last referred to, the Court announced at the very outset that it was not concerned with the sufficiency of the information as a criminal pleading that its review under the Criminal Appeals Act is limited to a decision on the alleged invalidity of the statute on which the information is based.

In the instant case we are concerned with the invalidity of the statute because of its numerous infirmities, and we believe our argument obviates any necessity for further proceedings on that account.

The opinions of Justices Douglas and Jackson are quoted above because they appear to be particularly apt in relation to the instant indictment, and for the further reason that they state the accepted tests for determining the validity of a penal statute.

Point IV.

THE ACT DEPRIVES APPELLEE OF PROCEDURAL DUE PROCESS.

A. Appellee under the Act is deprived of procedural due process.

Section 1252 (c) came before the U. S. Supreme Court as Section 20 (c) in the case of *United States* v. *Spector*, 343 U. S. 169, 172, 177, 180 (1952). It will be profitable to refer to that decision. The majority of the Court did not consider whether the statute on its face constituted a denial of procedural due process by not affording a defendant an "opportunity to have the court which tries him pass on the validity of the order of deportation" for the reason

that "[t]hat question was neither raised by the appellee nor briefed nor argued here. If it had been we might consider it. * * * That question is not foreclosed by this opinion."

Justice Jackson, in his dissenting opinion said that the statute "creates a crime * * * based on unlawful residence in the United States. The crime consists of two elements: one, an outstanding order for deportation of an alien; the other, the alien's willful failure to leave the country or take specified steps toward departure."

Mr. Justice Jackson, speaking in dissent with the concurrence of Justice Frankfurter, characterized the Court's omission to treat the procedural due process aspects of the statute as follows:

> "The Court intimates that it might be compelled to agree with this constitutional objection to the statute were the reasoning advanced by counsel."

Mr. Justice Jackson with the concurrence of Justices Frankfurter and Black considered the statute on its face to be unconstitutional, relying upon *Wong Wing* v. *United States*, 163 U. S. 228 (1896) as follows:

> "The Act does not permit the court which tries [the alien] for this crime to pass on the illegality of his presence. Production of an outstanding administrative order for his deportation becomes conclusive evidence of his unlawful presence and a consequent duty to take himself out of the country, and no inquiry into the correctness or validity of the order is permitted."

Mr. Justice Black speaks at page 174, ftn. 2 as follows:

> "My belief that the statute is void for vagueness makes it unnecessary for me to reach the constitutional question discussed by Mr. Justice Jackson, although I have not yet seen a satisfactory reason for rejecting his view. See my opinion in *Maggio* v. *Zeitz*, 333 U. S. 56, 78-81."

The section under discussion in the instant indictment, 1252 (d) creates a crime analogous to that in the *Spector* case, Section 1252 (e). (1) There is an outstanding order of deportation; (2) There is alleged to be a wilful failure to comply with regulations and restrictions imposed by the attorney general. Here again the act does "not permit the court which tries the alien for this crime to pass on the illegality of his presence."

Here too, "the production of an outstanding administrative order for [the alien's] deportation becomes conclusive evidence of his unlawful presence" and the "consequent" duty to comply with the regulations and restrictions upon his conduct.

Section 1252 (d) does not permit "inquiry into the correctness or validity of the order." Again "a deportation order is made to carry potential criminal consequences" and the administrative decision on the issue of unlawful presence is made "conclusive upon the criminal trial court" thus permitting this "vital element" of the crime to be established without a jury trial. (*United States* v. *Spector*, 348 U. S. 169 (1952).)

"It is our duty before reversing a judgment to examine any ground upon which it can be sustained, even a ground which the court below may have overlooked or expressly rejected."

Justice Jackson in *United States* v. *Spector*, 343 U. S. 169, 180 (1952).

The statute, on its face, sanctioning such procedure, is unconstitutional as a violation of the Fifth Amendment.

B. The statute is also repugnant to the Sixth Amendment.

Assume an alien is ordered deported for having been found guilty of crimes involving moral turpitude. Assume further he is placed on trial under section 1252 (d). The government will be permitted to introduce into evidence

a certified copy of the order of deportation as the basis for the present prosecution. A material fact which a criminal trial requires be established beyond a reasonable doubt would be established by a piece of paper. As to that material fact the defendant would be denied the right to confront and cross-examine the witnesses against him and the jury would have no opportunity to consider that vital, material part of the crime charged.

Another related vice that is inherent in the statute is that under its provisions, a determination of the existence of a material fact by an administrative hearing which is a civil proceeding, is *res judicata* in a subsequent criminal action. The statute is in conflict with the rule that a material fact in a criminal case may not be proved by introducing in evidence a judgment that was rendered against the accused in a civil action where that fact was in issue. (30 American Jurisprudence, page 1006, Judgments, section 295.) Conversely, the rule is that a judgment of acquittal in a criminal case is not *res judicata* as to any fact alleged in the indictment, in a subsequent deportation proceeding against the defendant. (*Lewis* v. *Frick*, 233 U. S. 291, 301, 302 (1914)).

Point V.

BILL OF ATTAINDER AND EX POST FACTO LAW.

One of the grounds for deportation in the Act is that an alien has been found to be a member of a group which is now the subject of deportation. If the order of deportation against the appellee is that he had been after entry a member of a specified group, the Act under which the defendant has been found deportable obviously makes deportable members of an easily identifiable class, and becomes by legislative fiat, a bill of attainder. (*U. S.* v. *Lovett*, 328 U. S. 303 (1946).)

Section 9 of Article I of the Constitution provides that no *ex post facto* law shall be passed. Here, under 1252 (d) penalties are provided in addition to deportation.

In *Jordan* v. *DeGeorge*, 341 U. S. 223 (1951), Mr. Chief Justice Vinson said, at page 230:

> "This court has repeatedly stated that criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process of law."

That the statute is an *ex post facto* law is made plain by the definition of such a law by the Supreme Court in *Burgess* v. *Salmon*, 97 U. S. 381, 384 (1878), where the Court said:

> "An *ex post facto* law is one which imposes a punishment for an act that was not punishable at the time it was committed, or a punishment in addition to that then prescribed."

See also *Lindsey* v. *Washington*, 301 U. S. 397, 401 (1937).

Point VI.

Section A.

DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS.

Section 1252 (d) on its face and as applied, deprives appellee of liberty without due process of law in violation of the Fifth Amendment to the Constitution.

Aliens, except for liability to deportation, are entitled as a matter of constitutional right to all civil rights and liberties accorded to citizens.

Bridges v. *Wixon*, 326 U. S. 135 (1945).
Chew v. *Colding*, 344 U. S. 590, 596 ftn. 5 (1953).

The power to expel aliens deemed undesirable cannot

be used to deprive them of these liberties and property rights without due process of law.

United States ex rel. Ross v. *Wallis*, 279 Fed. 401, 403 (C. C. A. 2d, 1922).

Petition of Brooks, 5 F. 2d 238, 239 (D. C. D. Mass. 1925).

The power to hold in custody or otherwise restrict the liberty of deportable aliens, without judicial trial, has been permitted only as an incident to the power to deport or exclude, pending deportation proceedings, and "while arrangements were being made for their deportation". *Wong Wing* v. *United States*, 163 U. S. 228 (1896.)

This discussion is necessary in considering the so-called supervisory parole regulations read by the Service to the appellee which will be found in the transcript of record on pages 28 to 31 inclusive. This regulation is pursuant to section 1252 (d).

In *United States ex rel. Mezei* v. *Shaughnessy*, 195 F. 2d 964, 967 (1952) the Court of Appeals for the Second Circuit said as follows:

> "But the power to hold can never be broader than the power to remove or shut out. To continue an alien's confinement beyond that moment when deportation becomes patently impossible is to deprive him of his liberty. See Walker vs. Chief Quarantine Officer, D. C. Canal Zone, 69 F. Supp. 980. And unless accompanied by those indicia of legal procedure that are embedded in the constitution as the right of all men * * * such confinement must violate the Fifth Amendment. * * * But where * * * confinement is no longer justifiable as a means to effectuate removal elsewhere, then liberty as such is at stake and the mandate of due process of law may be invoked by all, 'whether citizens, aliens, alien enemies or enemy belligerents.' Rutledge, J., dissenting in Re Yamashita, 327 U. S. 1, 41, 42."

The decision was reversed as inapplicable to an excludable alien as distinguished from a deportable alien, but since the appellee can only be deported (he is not excludable) the language of the decision is appropriate.

Section 1252 (d) fixes the period during which the attorney general may hold an undesirable alien in confinement while arranging for his actual deportation. If he has not arranged for or effectuated the alien's removal within six months after a final administrative order of deportation has been made, his power to detain the alien ends, and the alien must be given his freedom. See *United States ex rel. Kusman* v. *Shaughnessy*, 117 F. Supp. 541, 544-45 (D. C. S. D. N. Y. 1953), *United States ex rel Blankenstein v. Shaughnessy*, 117 F. Supp 699, 701, 703 (D. C. S. D. N. Y. 1953).

The courts have generally held that custody, whether by direct physical detention or by other control, pending actual deportation, which exceeds four to six months, constitutes an unreasonable and therefore an unlawful restraint. *U. S. ex rel. Ross* v. *Wallis*, 279 F. 401 (C. C. A. 2d, 1922), *Petition of Brooks*, 5 F. 2d 238 (D. C. Mass. 1925), *Saksagansky* v. *Weedin*, 53 F. 2d 13 (C. C. A. 9th, 1931), *United States ex rel. Dzuro* v. *District Director*, 102 F. Supp. 704 (D. C. S. D. N. Y. 1951).

Section 1252 (d) however, purports to extend authority to exercise powers, normally incidental to deportation, even after the power to physically deport cannot be carried out. The section attempts to authorize the attorney general to supervise and impose conditions and restrictions upon the life and liberty of those aliens whose removal from the country has been ordered but cannot be effectuated for an unlimited and unknown period of time after the power to detain to "make arrangements" for deportation has ended. *Carlson* v. *Landon*, 342 U. S. 524

(1952). *Cf. Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206, 215 (1953), where *Carlson* v. *Landon*, heavily relied on by appellant, is interpreted by Mr. Justice Clark, writing for the Court, as applying to "resident aliens temporarily detained pending expeditious consummation of deportation proceedings * * *."

In *Wong Wing* v. *United States*, 163 U. S. 228 (1896), the court determined that the deprivation of an alien's liberty, represented by his imprisonment without judicial trial, could not rest on the plenary power of the government to expel aliens, and therefore, constituted a violation of the Fifth Amendment.

The reasoning of the court is applicable to section 1252 (d). This section similarly seeks, without judicial trial, to deprive aliens of liberty by subjecting them to supervision which does and may further circumscribe their movements, restrict and impair their normal living and their right to work, for an unlimited period of time, conceivably as long as they may live, or until their departure from the United States can be effected. This procedure cannot possibly be equated to an incident of deportation. It is deliberate harassment and punishment for remaining within the confines of the United States because no other country will accept the individual.

Liberty is not restricted to mere absence of imprisonment. In *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954), the Supreme Court said:

> "Although the court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue. * * *"

See also

Williams v. *Fears*, 179 U. S. 270, 274 (1900).
Allgeyer v. *Louisiana*, 165 U. S. 578, 589 (1897).
Bauer v. *Acheson*, 106 F. Supp. 445, 450 (D. C. D. C. 1952).

Circuit Judge Anderson in *Petition of Brooks*, 5 F. 2d 238, 239, 240 (1925), sharply and unequivocally enunciated the proposition that the power to deport does not as well include the right without judicial trial, to restrict and impair freedom and liberty although short of actual imprisonment. In that case, too, the order of deportation could not be executed. The government contended that the alien should be released only on bond "and required to report at such intervals as the Commissioner of Immigration at Boston may deem advisable." Judge Anderson rejected this contention, saying:

> "He is entitled to be deported, or to have his freedom. * * * any further detention by the immigration authorities or control of [the alien's] freedom is illegal."

The conditions circumscribing and restricting the freedom of the defendant authorized by the statute and imposed by regulations are such a control of his freedom as to render the statute and the regulations illegal.

The statute attempting to give authority to the attorney general to supervise the lawful conduct of the appellee and to determine what he may or may not do, with whom he may or may not associate, when and how often he is to report, when and how often he is to be examined physically or psychiatrically, is a plain interference with the protected rights of a resident alien.

> "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty * * * secured by * * * the Constitution."
>
> *Williams* v. *Fears*, 179 U. S. 270, 274 (1900).

Section 1252 (d) violates the Fifth Amendment since the restrictions on the defendant's liberty are imposed without due process of law, and by administrative fiat only.

> • • • "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression."
>
> *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939).

Judged by the foregoing test, no amount of judicial interpretation can make Section 1252 (d) palatable constitutionally.

Point VI.

Section B.

THE STATUTE IS REPUGNANT TO THE TENTH AMENDMENT.

The statute under which the defendant was indicted is repugnant to the Tenth Amendment. It was not enacted under any power granted to Congress, it trenches upon the police powers of the several states.

The power to regulate naturalization and by implication, immigration and deportation, derives from, and is co-extensive with, the power of the United States as a sovereign nation, and the powers granted to Congress by section 8 of Article I of the Constitution "To regulate Commerce with foreign Nations," "To establish an uniform Rule of Naturalization", and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Power expressly granted to regulate naturalization and

to make all necessary and proper laws for carrying it into execution, includes, by implication, power to create such means as are necessary and proper for executing the granted power, *e.g.*, to establish an administrative agency, prescribe its mode of procedure, and its authority, to deport, to take the deportee into temporary custody; and further, to provide such measures as shall be necessary and proper for the enforcement of all such laws.

The statute subjects an alien who wilfully fails to "give information under oath * * * as the Attorney General may deem fit and proper", to fine and imprisonment. It was not enacted under the implied power of Congress over deportation, as it obviously applies only to an alien who is not then deportable. The question then is, whether it is such a measure as is necessary and proper for carrying into execution the power of Congress over naturalization. Subject to the inhibitions contained in the First and Fifth Amendments, Congress may make such laws as it deems necessary and proper for carrying that power into execution.

The words "necessary and proper" in the last clause of Section 8, Article I of the Constitution are words of limitation and prescribe the areas of legislative power. Within the bounds of that area, the power of Congress to legislate is unfettered and supreme, but congressional legislation which strays beyond the bounds of what is necessary and proper is unauthorized and unconstitutional, and as ineffective as if it had not been enacted. As said in *Linder* v. *United States*, 268 U. S. 5, 22 (1925), "Federal power is delegated, and its prescribed limits must not be transcended even though the end seem desirable." See *United States* v. *Butler*, 297 U. S. 1, 68-69 (1936) where Mr. Justice Roberts stated:

> "It is an established principle that the attainment of a prohibited end may not be accomplished under

> the pretext of the exertion of powers which are granted. * * * And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced."

Is criminal punishment as provided by section 1252 (d) necessary and proper for carrying into execution the power entrusted to Congress to regulate naturalization, and by implication, deportation? The statute, to be within bounds prescribed by the words *necessary and proper* must be appropriate, and "really calculated to effect * * * the objects entrusted to the government," since "Congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful, or *because they make the government stronger.* There must be some relation between the means and the end; some adaptedness or appropriateness of the laws to carry into execution the powers created by the Constitution." (Emphasis added.) *Legal Tender Cases,* 12 Wall. (79 U. S.) 457, 542-543 (1872).

The means which the statute provides for carrying into execution the delegated power must be "appropriate and needful" *Oklahoma* v. *Atkinson,* 313 U. S. 508, 526 (1941); and must "have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York,* 291 U. S. 502, 525 (1934).

In view of these decisions of this Court defining the term "necessary and proper", can it be said that the imposition of the supervision provided by the statute resulting in criminal penalty for its breach is necessary and proper for carrying into execution the power of Congress to regulate naturalization and deportation? Is the imposi-

tion of such restrictions an "appropriate and needful" means for carrying out the power to deport? These questions must be answered in the negative. There is a "necessity" for supervision, according to the government, only because deportation *cannot* be effected. The broad and unrestricted power of the attorney general to require information as he "may deem fit and proper" to be exercised by him when deportation is impossible, about subjects unrelated to deportation, cannot be "appropriate and needful" to deportation. The "power to deport" is itself an implied power from the constitutional power over "naturalization", and, as such implied power, should be strictly construed.

The statute does nothing more than impose a penalty, a penalty of restriction of freedom and imposition of inquisition because of "the inability of this Government to carry out its policy to rid the country of their presence in conformity with law," (Appellant's jurisdictional statement p. 9), with the added possibility of criminal sanctions upon breach of the all encompassing and vague provisions of the statute. The effect of such criminal penalties is to postpone rather than encourage deportation. It is clear that the imposition of such penalties is neither necessary nor proper for carrying into execution any of the powers delegated to Congress, and therefore contravenes the Tenth Amendment.

The government argues: "If, as must be conceded, Congress has the power to expel him from the country entirely, it must have the power to deal with the situation presented by the inability to effectuate deportation." (Appellant's main brief, page 33.) No authority is cited for the proposition that the government "must" have such power. As previously pointed out, the government can have only powers necessary and proper to the "power to expel". The government further argues that because

citizens may be called into the armed forces of the nation, "involving for such citizens grave impact upon their customary liberties, it is not unreasonable to provide for supervision of aliens whose past record discloses a contribution to the source of the current danger." (Appellant's main brief at page 35.) As indicated at page 2 of this brief, the record is bare of any evidence or allegation of this alien's "past".

It is, of course, inappropriate to compare supervision of a deportable alien with service in the armed forces of one's country, which is considered a public service. It is otherwise inapt because whereas induction into the armed forces is clearly "necessary and proper" "to raise and support Armies" and "to declare War", powers specifically given to Congress by the Constitution, supervision of an alien, not presently deportable, is not "necessary and proper" to carrying out the constitutionally implied power to deport.

In *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 13-14 (1955), this court considered whether Congress had overreached in enacting a law providing that "termination" of military service would not relieve a person of trial by court martial for certain offenses committed while a member of the armed forces. The Court found that such an Act "cannot be sustained on the constitutional power of Congress 'to raise and support Armies,' 'To declare War,' or to punish 'Offenses against the Law of Nations.' And this assertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or on any theory of martial law. See *Ex Parte Mulligan*, 4 Wall. 2, 124-127. The Government's contention is that the Act is a valid exercise of the power granted Congress in Article I of the Constitution 'To make Rules for the Government and Regulations of the land and naval Forces' as supplemented by the Necessary and Proper clause." (Reference to footnotes omitted.)

After indicating the differences between military tribunals and federal courts, the Court said at page 17: "Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served."

The Court found the law unconstitutional for the foregoing reasons, among others.

The government argues that the constitutional power to expel "must" carry with it a power to "supervise". Just as "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise" it is the primary business of the government in relation to its implied power to deport, to deport or be ready to deport should the occasion arise. Supervision, as required by Section 1252 (d) is not even "incidental" to such power to deport. It is likewise true that "to the extent that those responsible for performance of this primary function are diverted from it by the necessity" of supervision, the basic purpose, "to deport", is not served.

If Congress, under its power to regulate naturalization may subject aliens in this country to criminal penalties, although the imposition of such penalties is neither necessary or proper for carrying such power into execution, then, as said in *Keller* v. *United States*, 213 U. S. 138, 148 (1909), "[A]n immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the States, may be taken by Congress away from them."

In *Hines* v. *Davidowitz*, 312 U. S. 52, 76 (1941), Mr. Justice Stone, in a dissenting opinion, stated the following well

established principle of law: "The national government has exclusive control over the admission of aliens into the United States but, after entry, an alien resident within a state, like a citizen, is subject to the police powers of the state * * *." See also *House* v. *Mayes*, 219 U. S. 270, 282 (1911), where Mr. Justice Harlan, speaking for the court said:

> "* * * power in the State, generally referred to as its police power, is not granted by or derived from the Federal Constitution but exists independently of it, by reason of its never having been surrendered by the State to the General Government; that among the powers of the State, not surrendered—which power therefore remains with the State—is the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the common good * * *."

See *United States* v. *Butler*, 297 U. S. 68-69 (1936).

It has already been pointed out that the states have adequately provided legislation covering any possible danger arising out of criminal activities of the alien during his continued residence. For the Congress to "supervise" a resident alien as provided in section 1252 (d) transgresses the power reserved to the states by the Tenth Amendment, and not being a "necessary and proper" incident to the implied power to deport, is unconstitutional and void.

Point VII.

PUNISHMENT INFLICTED IN VIOLATION OF THE FIFTH AMENDMENT.

Section 1252 (d) on its face and as applied inflicts punishment on the defendant in violation of the Fifth Amendment to the United States Constitution.

In *Cummings* v. *Missouri*, 4 Wall. (71 U. S.) 277, 320 (1866) the proposition was established that "the deprivation of any rights, civil or political * * * may be punishment, the circumstances attending the causes of the deprivation determining this fact."

Here the defendant has not been or cannot be deported. The power to "supervise" granted by section 1252 (d) has no reasonable relation to the exercise of any of the powers which Congress may exercise over deportation and the deportable alien.

Supervision is intended to be punitive. An analogy with the *Cummings* case will illustrate that point. The oath in the *Cummings* case "was required to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen." *Cf.* Appellant's jurisdictional statement at page 9, where H. Rep. 1192, page 10, is quoted for the rationale behind this legislation: "The committee feels that aliens illegally here are not necessarily entitled to enjoy precisely the same privileges as those who are lawfully resident, merely because of the inability of this Government to carry out its policy to rid the country of their presence in conformity with law."

1252 (d) was not intended to be directed at control of the defendant pending the conclusion of deportation proceedings. It does not become applicable until six months after the final conclusion of the deportation proceeding. It is not a temporary control while arrangements are being made for deportation. It is precisely because deportation cannot be effected within the prior six months that 1252 (d) enters the act. And from that moment deprivations and restrictions are exercised, many of which could not have been exercised during the initial six month period.

Out of frustration and a desire to punish, regulations are promulgated, questions as to conduct, association are propounded, medical and psychiatric examination may be demanded, as well as information whether relevant or not, and restrictions placed on the lawful conduct and lawful associations of the defendant.

These conditions establish, as a substitute for the jail to which the defendant may not be sent, a system of police surveillance that differs only in degree, but not in kind from imprisonment.

The government practically makes such an admission in its brief. (page 35.) The government argues that the defendant belongs to a special class. It says at page 35: "The limited supervisory precautions taken with respect to him, to the restricted extent that they may affect his liberty, are justified by his special position in our society and the counterbalancing necessity to prevent or at least warn of further conduct harmful to the United States." The laws of the United States know of no special classes, but the Congress has attempted to create a special class of those persons whom it cannot deport, and to make their enforced stay here as painful as possible.

The attorney general has practically complete control of the appellee. He sends for him and he comes at once.

He asks questions and the appellee answers those which he believes it pertinent that he answer. He has been restricted in his movements to fifty miles from Chicago (R. 30), and he has abided by that restriction. He has been told to make application to some country for admittance — he has done so, but thus far no other country has agreed to accept him. (R. 49, 50.)

Now he has been indicted for failing or refusing to answer questions. (See R. 2.) The questions consist generally of whether he visited certain places, whether he knows certain editors or individuals, without indicating any particular significance in relation to those individuals, whether he has attended any meetings or moving pictures, whether he has addressed lodges, whether he has distributed leaflets, whether he is a member of certain organizations including the communist party.

Apparently, the government in its brief has abandoned, as it should have, any argument on all the questions save two. The government insists that it has a right to answers to the following (Appellant's main brief, page 29):

"1. Since the order of deportation was entered in your case on June 25, 1953, have you attended any meeting of the Communist Party of the U. S. A.?

2. Are you now a member of the Communist Party of the U. S. A.?"

It is for failure to answer these two questions that the appellee should be punished by imprisonment.

Suppose the appellee had refused to answer the questions relying on the Fifth Amendment? How would the attorney general have been helped in his supervision of the appellee. What additional information would that have given him as to the activities of the appellee? Or does the attorney general take the position that even if the appellee had relied on the Fifth Amendment he would

still be subject to indictment? What could the attorney general have done to correct the conduct of the appellee or to save the nation from the results of the appellee's "evil" associations or "evil" thought with or without the answers to the two questions? As the District Court said, "the Attorney General is powerless to take any further action even if [his prior undesirable activities] are continuing." (R. 19.)

Arguendo, suppose the appellee had admitted that he was still a member of the communist party and that he still attended meetings of the communist party? Would that knowledge coming directly to the attorney general from the appellee give the attorney general any greater or additional rights than he already had?

Section 4 (f) of the Internal Security Act (50 U. S. C. 783 (f)) provides: "Neither the holding of office nor membership in any communist organization by any person shall constitute *per se* a violation of subsection (a) or subsection (c) of this section or *of any other criminal statute.*" (Emphasis added.)

Suppose the appellee answered in the affirmative all questions regarding persons he knew, the moving pictures he saw, the newspapers he read, including the Chicago Tribune and the Daily Worker (and he was asked and refused to answer whether he read the Chicago Tribune), the meetings he attended and addressed; suppose the appellee, throwing his rights to the wind, bared his soul, and told all of his uneventful and insignificant life's story from the cradle to the present, how would the attorney general be aided in his supervision of the appellee? Would that in any way at all help effect the appellee's deportation? The government tried to deport him during the first six months after he was declared deportable, and since, and thus far, over a period of three and one-half years, the government has found no haven for him. If the appellee

confessed that he knew Tom Jones or Joseph Smith would that be of any assistance to the attorney general in deporting him?

It is absurd for the government to take the position that this information, for whatever it is worth, is necessary to the attorney general for purposes of deportation. Certainly on the question of membership in the communist party, the government with its all pervading Federal Bureau of Investigation doesn't need any help from this appellee as to his activities. They know who he is, what he does and where they can find him every minute of every day.

The real purpose of the questions and the penalties to be imposed for failure to answer is to divest the appellee of whatever feeling of freedom he might otherwise have left to himself. The purpose is not security for the nation.

To equate this so-called supervision with restrictions placed upon the armed forces is to attempt an analogy that has no basis in fact or logic. The members of the armed forces have at least the status of citizenship or potential citizenship. The appellee has been ordered out of the country and is still here only because there is no place to which he can go. The restrictions on the citizen as a member of the armed forces are pertinent to the maintenance of an army. The so-called supervision desired to be exercised over the appellee has no relationship or relevancy to his deportation.

The attorney general may indict and punish the appellee for any of dozens of violations of federal laws, and the appellee may be indicted and punished for infractions of the criminal laws of 48 states. That provides the ultimate in supervision. The appellee registers as an alien each year [8 U. S. C. Section 1302]; he reports to the Service at regular intervals. For all he knows the

Service has its agents watching and reporting on him. Thus far there is no record that he has been found to have violated any laws.

An innocent purpose cannot be attributed to the regulations. They are not needed to insure the deportation of the appellee. The fact that questions were propounded to the defendant which it is alleged he refused to answer, proves he responded when called. The indictment does not charge him with refusal to respond to the call of the Service, but on the contrary alleges that he did respond (R. 1).

To control the activities, associations, the reading of the appellee, to require him to submit to mental and physical examination, to conform to restrictions as to the reasonableness of which there may well be legitimate disagreement, all these are punishment inflicted without due process of law and solely by administrative fiat, and renders section 1252 (d) violative of the Fifth Amendment.

Point VIII.

APPELLEE IS DEPRIVED OF EQUAL PROTECTION OF THE LAW.

Section 1252 (d) deprives the appellee of the equal protection of the laws in violation of the Fifth Amendment to the Constitution.

Yick Wo v. *Hopkins*, 118 U. S. 356 (1886), has settled that the guarantee of equal protection of laws extends not only to citizens but to aliens as well.

The due process clause of the Fifth Amendment embraces the guarantee of equal protection of the laws to the extent that it dictates that a law, or its enforcement, may not create arbitrary or unreasonable classifications and impose upon such classes special burdens or obligations.

Detroit Bank v. *United States*, 317 U. S. 329 (1943).

Hirabayashi v. *United States*, 320 U. S. 81 (1943).

Carleton Screw Products Co. v. *Fleming*, 126 F. 2d 537 (C. C. A. 8th, 1942), cert. den. 317 U. S. 634 (1942).

Pfeiffer Brewing Co. v. *Bowles*, 146 F. 2d 1006 (Em. Ct. App. 1945), cert. den. 324 U. S. 865 (1945).

Conduct, activity or association which the Congress believes makes an alien an undesirable resident of the United States renders him "subject to the plenary power of Congress to expel [him] under the sovereign right to determine what noncitizens shall be permitted to remain within our borders." *Carlson* v. *Landon*, 342 U. S. 524, 534 (1952). The power to detain, or instead, to impose regulations on conduct to insure deportation of undesirable aliens, exists, apparently, as an "incident" to the power to deport. *Carlson* v. *Landon*, 342 U. S. 524 (1952.)

Where the power to deport ceases or is rendered ineffectual, however, after the six-month period prescribed by statute, constitutional authority to exercise the powers of 1252 (d) over the alien incidental to deportation terminate.

By the terms of section 1252 itself, the authority to detain or to substitute bail conditions in place of detention, is terminated six months after the entry of a final administrative order of deportation.

The alien, whose deportation, through no fault of his own, cannot be effectuated within the time limited, is resident in the United States, until such time as he can be deported, and he is entitled to the rights guaranteed by the Constitution to all people within our borders.

The conditions imposed by 1252 (d) are not and can-

not be prescribed for a citizen. The added burdens imposed by this section on its face and as applied here are patently, by reason of alienage alone. Therefore, this section, and the regulations promulgated thereunder, deprive the appellee of the equal protection of the laws.

Point IX.

UNLAWFUL DELEGATION OF LEGISLATIVE POWER.

Section 1252 (d) unlawfully delegates legislative power to the attorney general. His application thereof is a usurpation of legislative power in violation of Article I, Section 1 of the United States Constitution.

The alien is given over to the supervision of the attorney general under regulations prescribed by him.

For such a delegation of power to be constitutionally valid the statute must declare a guiding "policy" or establist a "rule" or "an intelligible principle" or such policy, rule or principle, must be found in the "purpose of the act, its factual background and the statutory context in which they appear."

United States ex rel. Knauff v. *Shaughnessy*, 338 U. S. 537, 543 (1950).

Lichter v. *United States*, 334 U. S. 742, 785 (1948).

American Power & Light Co. v. *Securities & Exchange Commission*, 329 U. S. 90, 104-5 (1946).

Schechter Poultry Corporation v. *United States*, 295 U. S. 495 (1935).

Panama Refining Co. v. *Ryan*, 293 U. S. 388 (1935).

Sub-section 4 of 1252 (d) establishes no policy, rule or principle to limit or guide the attorney general in framing regulations. The sub-section requires an alien to "conform to such reasonable written restrictions on his con-

duct and activity as are prescribed by the attorney general." It therefore invests the attorney general with an unlimited and undefined power not only to regulate beyond the specific prescription of subsections 1, 2 and 3, but as to any other matter he may choose.

Subsection 3 requires the alien to give "such other information whether or not related to the foregoing, as the attorney general may deem fit and proper." As the attorney general states, the language of the statute is of "eloquent breadth." (Appellant's main brief, page 15.) It grants the attorney general a roving commission to demand information of any sort—it is a star chamber inquisition. Nothing is sacred as far as the alien is concerned. No recess of his mind, no idea, no belief, no thought, no business, political or personal activity is free from the probe of the attorney general or the numerous assistants in his service. The alien is denied his right of privacy, a cherished possession in the opinion of the founding fathers, and one which the law guarantees to aliens and citizens alike.

By virtue of the delegation granted by section 1252 (d) to control the lives and restrict the liberty of the alien, the attorney general has been given a free hand. By virtue of the criminal penalty provided in the section, the attorney general has been given power to legislate a series of crimes for conduct or activity which is not otherwise criminal, and cannot be criminal, and cannot be made so by the Act.

All of the foregoing should give added weight to the argument on behalf of the appellee that he is protected by the First Amendment to the Constitution and that by invoking the First Amendment that should be sufficient to justify his refusal to answer the questions set forth in the indictment.

"Implied authority in an executive officer or department

to repeal, extend or modify an act of Congress may not be lawfully inferred from authority to enforce it, and a regulation of * * * any * * * executive officer, made under legislative authority to make rules to enforce an act of Congress, which has the effect to subject classes of property to forfeiture and classes of persons to fines and penalties under the act, that are excluded therefrom by the terms of the law, is unauthorized and void." *United States* v. *11,150 Pounds of Butter*, 195 F. 657, 663 (C. C. A. 8th, 1912) and cases cited therein. See also *United States* v. *Carolina Canners Corporation*, 315 U. S. 475, 489 (1942).

It is believed that the following quotation from Justice Black's dissent in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206, 217-218 (1953), is particularly appropriate here:

> "No society is free where government makes one person's liberty depend upon the arbitrary will of another. Dictatorships have done this since time immemorial. They do now. * * * Our Bill of Rights was written to prevent such oppressive practices. Under it this Nation has fostered and protected individual freedom. The Founders abhorred arbitrary one-man' imprisonments. Their belief was—our constitutional principles are—that no person of any faith, rich or poor, high or low, native or foreigner, white or colored, can have his life, liberty or property taken 'without due process of law.'"

Point X.

THE INDICTMENT IS INSUFFICIENT TO CHARGE AN OFFENSE.

We have shown, we believe, that the statute under which the indictment is drawn is constitutionally defective. Assuming, *arguendo*, that the statute meets constitutional tests, the indictment nevertheless is insufficient to charge a crime.

The statute does not subject to punishment any alien against whom an order of deportation is outstanding, but only an "alien against whom an order of deportation is outstanding" under a particular statute or portion of the statute. Hence, the indictment, to bring the appellee within the reach of the statute, must charge that the outstanding order of deportation was made under a particular statute. The indictment makes no such charge. The indictment charges that the defendant "is an alien against whom an order of deportation theretofore had issued and been outstanding more than six months," etc. So much of the charge may be true, but the order of deportation may be one that is outstanding against the defendant under another statute in which case the defendant would not be punishable under section 1252 (d).

The applicable rule in this case is concisely stated in Joyce on Indictments (2d ed. 1924) sec. 285 at page 316, where it is said: "[t]he sufficiency of an indictment depends on whether the facts there alleged can be true and the defendant yet be innocent of the offense intended to be charged."

Failure to charge a fact or circumstance in the absence of which there cannot be a crime under the statute which created the crime, renders the indictment fatally defective.

There are other necessary allegations missing from the indictment which render the indictment fatally defective, in whatever form the statute might be drawn, and we have called attention to these insufficiencies in our motions to dismiss. (R. 4 and 5.)

The indictment would not be sufficient to constitute an offense unless it alleged each of the following matters:

1. The nature of the act which rendered the appellee deportable.
2. The entry of an order of deportation under the particular statute involved.

3. Knowledge by the defendant of the entry of the order of deportation and of the contents thereof.

4. The order of deportation itself, and that it was entered after a hearing pursuant to the terms of the statute.

Unless these facts are alleged in the indictment, conviction of the accused cannot be had under the Constitution and the laws relating to crime.

None of the foregoing facts may be inferred—they have to be charged in the indictment. The applicable rule is stated in *United States* v. *Hess*, 124 U. S. 483, 486 (1888), in the following language:

> "[t]he universal rule, on the subject, is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly and not inferentially, or by way of recital."

Other authorities on the present subject will be found in *United States* v. *Weber*, 71 F. Supp. 88, 90 (1947). The word "willfully" in the statute requires an allegation of all such facts which if unknown to him would not subject him to the punishment which the statute prescribed.

In *United States* v. *Carll*, 105 U. S. 611 (1881), the indictment charged that the defendant "feloniously, and with intent to defraud" a certain named bank, "did pass, utter and publish upon and to said bank certain falsely made, forged, counterfeited and altered obligations of the United States" but the indictment failed to charge that the defendant, at the time he uttered these obligations, had knowledge of their character. The defendant was convicted by a jury "under instructions which required them to be satisfied of the facts alleged, and that the defendant, at the time of

uttering the obligations, knew them to be false, forged and counterfeited and altered." The Supreme Court held that knowledge may not be inferred, and that the failure of the indictment to charge that the defendant had knowledge of the character of the obligations was a fatal defect which was not cured by the instructions to the jury, and that the objection to the indictment was properly raised by a motion in arrest of judgment.

CONCLUSION.

It is the belief of counsel that never since the early history of our country has the Congress adopted an Act as punitive and as opposed to American concepts of decency and the Bill of Rights, as is the present Immigration & Nationality Act.

Thomas Jefferson, in a letter to James Madison, datelined Paris, March 17, 1789 wrote: "The tyranny of legislatures is the most formidable dread at present and will be for many years." (H. A. Washington, The Writings of Thomas Jefferson, Vol. 3, page 5.)

We respectfully urge the court to affirm the judgment of the court below and to express its views on the constitutional issues raised here.

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